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In The

Supreme Court of the United States

October Term, 1973

No. 73-1282

EUNICE S. FOUNTAIN,

Petitioner,

v.

SPENCER FOUNTAIN,

Respondent.

and

EVA L. JACKSON,

Petitioner,

v.

JUNIUS I. JACKSON,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

JAMES A. EICHNER
Allen, Allen, Allen & Allen
1809 Staples Mill Road
Richmond, Virginia 23230

Counsel for Petitioners

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EUNICE S. FOUNTAIN,

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EVA L. JACKSON,

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v.

JUNIUS I. JACKSON,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners pray that writs of certiorari issue to review judgments of the Supreme Court of Virginia in these two cases, consolidated there for appeal, rendered November 26, 1973.

OPINIONS BELOW

The opinions below are reported at 214 Va. 347, 200 S.E.2d 513, and 214 Va. 351, 200 S.E.2d 515, and appear

as Appendix A at pp. 17-21 *infra*. The trial court opinion in *Jackson* is Appendix B, p. 22 *infra*. None was written in *Fountain*.

JURISDICTION

The final judgments of the state supreme court were rendered November 26, 1973. Execution thereon was stayed pending action on this petition by orders entered January 4, 1974. Appendix C, pp. 23-25 *infra*.

Jurisdiction is based on 28 U.S.C. § 1257(3). Cases supporting jurisdiction include *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964), and *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673 (1930).

QUESTION PRESENTED FOR REVIEW

When a state supreme court in 1971 overrules prior common law rulings that one spouse cannot sue another, and minor child cannot sue parent, for motor vehicle negligence, and thereby permits recovery for injuries sustained in *1968* by the appellants in those cases, and other parties, including petitioners here, have brought actions against their spouses for injuries arising out of automobile accidents occurring in *1970*, does a denial of limited retrospective operation of the overruling decisions, so as to bar petitioners' actions, deprive petitioners and other similarly situated claimants of their property without due process of law, or of equal protection of the laws, when their claims are covered by automobile insurance, and the proof shows no prejudice to insured or insurer, and no adverse effect on insurance rates, by permitting such limited retrospective application, confined to claims for accidents occurring no earlier than those giving rise to the overruling decisions?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Code of Virginia (1950), Section 1-10:

> "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."

STATEMENT OF THE CASE

Smith v. *Kauffman*, 212 Va. 181, 183 S.E.2d 190, and *Surratt* v. *Thompson*, 212 Va. 191, 183 S.E.2d 200, both decided September 1, 1971, overruling prior Virginia decisions holding that minor child could not sue parent, and spouse could not sue spouse, for personal injury caused by automobile negligence, involved injuries sustained on August 18, 1968, and June 23, 1968.[1]

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[1] Because the State Supreme Court's opinions ignore these crucial dates, and other important factual matter set out in the briefs and Appendix below, a full set of those papers is filed herewith and occasionally referred to herein. Appendix E, p. 28 *infra*, excerpts from the complaints in the *Smith* and *Surratt* cases, shows the dates of their injuries. Petitioners' briefs below will be cited herein as, e.g., "Jackson Brief" or "Fountain Reply Brief" and respondents' briefs as, e.g., "*Spencer* Fountain Brief." Both Jacksons incorporated the *Fountain* case briefs into theirs for brevity, pursuant to the order of the state court consolidating the cases for argument and granting the parties' prayer to place them on the privileged docket because "a question of exceptional importance to the Courts of the Commonwealth is involved." Junius Jackson Opening Brief, pp. 33-34. The crucial dates of the four accidents are discussed in Fountain Brief, pp. 8-9; Fountain Reply Brief, pp. 5-6, 8; Jackson Brief, pp. 5-6.

Petitioner Jackson was injured August 9, 1970, and by awarding her an $8,000 verdict, the jury found her injuries were caused solely by the negligence of her husband. Petitioner Fountain was injured August 11, 1970, and the jury found her husband's negligence was the sole cause of the three-vehicle accident in which she was injured.[2]

Both respondents were insured by State Farm Mutual Automobile Insurance Company under policies which *did not say* that intrafamily suits were not covered, and the insureds were never told this.[3]

In each case, substantial property damage was caused, and State Farm knew that Virginia had long allowed interspousal suits for property damage.[4] Petitioner Jackson's car was a total loss.[5] As insurer for respondent Fountain, handling both medical payments and substantial property damage claims, State Farm said in December, 1970, that it had made "a careful investigation" of the accident, including a verbatim transcript of a prompt interview with a disinterested witness slightly over a month after the accident, and shortly knew "all of" petitioner Fountain's injuries.[6]

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[2] Respondent Fountain was dismissed as a defendant before trial on a ruling that *Surratt* would not be applied retrospectively. Appendix D, p. 26 *infra*. The jury found in favor of the other two defendants under Instruction 1, which said it could do so only if respondent Fountain's negligence was the sole cause of the accident. Appendix below, p. 29. The court below refused to review the judgment in favor of those drivers. Appendix C, p. 23 *infra*.

[3] Fountain Stipulation, Appendix below, p. 3, ¶ 5; respondent Jackson's deposition, original record below, p. 73; Jackson Brief, p. 3. Insurers were less reluctant to give information on the subject to their insureds in other states whose decisions apparently were relied on by the court below. See p. 10 *infra*.

[4] E.g., *Vigilant Insurance Co.* v. *Bennett*, 197 Va. 216, 89 S.E.2d 69 (1955).

[5] Original record, pp. 49-52.

[6] Appendix below, pp. 21-28, 47.

Depositions of state insurance rate analysts, read in both cases, show that neither the old rule of intrafamily immunity, nor retroactivity of the decisions abolishing them, would have any effect on insurance rates, and that it had never been suggested that such immunities were a factor in rate making in any Virginia rate proceeding, including a recent filing by State Farm itself, the country's largest insurer, which in 1971 collected in Virginia auto liability premiums of over $30,000,000 and paid losses of less than $17,500,000.[7]

THE STAGE AND MANNER IN WHICH THE FEDERAL QUESTIONS WERE PRESENTED BELOW

Petitioner Fountain raised the constitutional questions here presented in the trial court by her objection to its pretrial order granting respondent Fountain's motion for summary judgment and, after verdict against petitioner, in her objection to its order denying a new trial, and by her assignments of error. Appendix D, pp. 26-28 *infra*. Petitioner Jackson had no occasion to do so because she prevailed in the trial court. Appendix B, p. 22 *infra*. In the state supreme court the constitutional questions were argued at pp. 5 and 6 of petitioner Jackson's Brief; p. 8 of petitioner Fountain's Opening Brief; p. 8 of her Reply Brief, and orally.

REASONS FOR GRANTING THE WRIT

Petitioners point out not only invidiously discriminatory application of changed state law as to them, but also that there are many other seriously injured Virginians similarly situated—some hurt only *a few days* before the overruling *Smith* and *Surratt* decisions—who likewise find the court-

[7] Appendix below, pp. 9, 11, 13-15, 19-20; Fountain Opening Brief, p. 4.

room doors barred unless the judgments below are reversed. Some are expected to pray leave to appear as *amici curiae* herein.

Nor is this a peculiarly Virginian problem. The court below, in citing with approval foreign decisions denying retrospective application to cases abolishing intrafamily immunity, curiously ignored later decisions *from those states*, cited to the Court below and discussed at pp. 10-11 *infra*, which show that the very problem presented by this petition continues to be dealt with there, and probably will come before this Court from another state if *certiorari* is not granted herein.

Where deprivation of Fourteenth Amendment rights is charged, it makes no difference whether state power is exerted by a court changing, applying, or ignoring a common law rule, or by a legislature, or whether it is in a civil action. *Ex Parte Virginia*, 100 U.S. 339, 346-7 (1879); *New York Times* v. *Sullivan*, 376 U.S. 264, 265 (1964); *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1930).

Thus recent analogous decisions concerning interpretation of state *legislation* are pertinent here:

Glona v. *American Guarantee and Liability Ins. Co.*, 391 U.S. 73, 75 (1968), held that construing a state death statute to forbid suit for death of an *illegitimate* child denied his mother equal protection of the laws: "A law which creates an open season on illegitimates *in the area of automobile accidents* gives a *windfall to tort feasors.*"[8] (Italics added here and below.)

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[8] The intrafamily immunity rule in the same area was said by the dissenter in since-overruled *Franco* v. *Davis*, 51 N.J. 237, 239 A.2d 1, 4 (1968), to have only one effect: "giving *a substantial windfall* to the insurance carrier." This is proven by the evidence in the present case. See pp. 4-5 *supra*.

In deciding the same day that a state court may not constitutionally construe a death statute to deny recovery to illegitimate beneficiaries, the Court in *Levy* v. *Louisiana*, 391 U.S. 68, 71 (1968) (cited to, but ignored by, the court below), said for a state rule to be sustained under the equal protection clause it must *not* "draw a line which constitutes an invidious discrimination against a particular class"; "the line drawn" must be "a rational one." Applying *Levy* to a state workmen's compensation case in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172, (1972), the Court said validity of a state rule of law under the equal protection clause "requires, at a minimum, that a statutory classification bear some *rational relationship to a legitimate state purpose.*" The state has an interest in facilitating recovery for persons hurt in automobile accidents, as evidenced by the incidence of insurance aided by state legislation discussed in *Smith* v. *Kauffman*, 212 Va. at 184-85, 183 S.E.2d at 193-94. The uncontradicted evidence in this case, showing *no prejudice* to insurers or insureds from permitting retroactivity of *Smith* and *Surratt*, belies any legitimate state purpose to support Virginia's allowance of tort recovery to some intrafamily claimants hurt in 1968 and 1971, while flatly denying it to petitioners, hurt in 1970, and others similarly situated.[9]

The court below, while not explicitly mentioning the equal protection question presented to it, in passing referred

[9] The legislative branch apparently considers denial of compensation to many auto accident victims is also a matter of serious *Federal* concern. See, e.g., the National No-Fault Motor Vehicle Insurance Act, S. 945, 92nd Congress, and Senate Commerce Committee Reports 92-891, criticizing (p. 16) the situation in which "no liability insurance benefits now [are] paid to certain classes of victims," and 93-382, criticizing (p. 21) the fact that: "People who pay insurance premiums may receive no insurance benefits . . . when they are injured in an accident."

to various *criminal procedure* decisions of that court and this, including *Linkletter* v. *Walker*, 381 U.S. 622, 624-5, 638, 640 (1965), which quoted Mr. Justice Cardozo on retroactivity of repeal of a rule that might "work hardship to those who [had] trusted to its existence"; said a decision on retroactivity should be based on avoidance of "*injustice or hardship*," and concluded that opening up countless *criminal* convictions "would seriously disrupt the administration of justice," holding no more than that a change in decisional law to exclude illegally acquired evidence from state trials did not require the court "to overturn all *final*[10] convictions based upon it."

In the only *civil* case decided by this Court referred to below, *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), a prior decision invalidating a state scheme for financing sectarian schools was held *not* to be applied retroactively so as to require refund of past payments, because "the schools' reliance on promised payment for expenses incurred by them" *before* the date of the decision in *Lemon* I, and their "*reliance* on the state statute" there invalidated "*inviting* the contracts made and authorizing reimbursement for *past* services," far outweighed "the *remote possibility* of constitutional harm from allowing the State to keep its bargain." The Court said in determining whether to "reach back to disturb or to attach legal consequences to patterns of conduct" it should use a "balancing approach: we looked to 'the prior history of the rule in question, its purpose and effect, and whether retrospective operations will further or retard its operation.' " 411 U.S. at 198, 199, 203.

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[10] Of course, at the time the court below decided the *Smith* and *Surratt* cases, petitioners' had not yet been litigated. Mr. Justice Cardozo has pointed out that a challenged tort rule "may not reasonably be supposed to have determined the conduct of the litigants." *Nature of the Judicial Process*, quoted in *Silesky* v. *Kelman*, 281 Minn. 431, 161 N.W.2d 631, 633 (1968).

Lemon I and II thus provide a classic example of a type of change in decisional law which should *not* be given retrospective effect, according to Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 Va. L. Rev. 201 (1965), an article cited by, but whose reasoning was ignored by, the court below. Municipal finance, like title to property and commercial transactions, is a field in which Professor Currier points out *true* past justifiable reliance on overruled law is involved. But: "The history of Anglo-American *tort* law has been largely that of *retroactive* judicial expansion of tort liability, *without concern for the tortfeasor's reliance*. . . The *weightier interest* here, at least by modern standards, seems to lie with the tort victim; his plight demands compensation, even at the expense of revising precedent, and the demand has *traditionally* been answered in a retroactive way. . . . More important, the courts *need not go as far to protect such reliance* as may exist in this area as in the *property* field, because here *reliance, such as it is, is at best only one-sided*, and to protect it *requires denial of equality to tort claimants* . . . [T]here is *no rational basis* for distinguishing between tort claimants injured before and after the overruling decision . . . [C]ourts . . . seem to have reached the best result in retroactively applying new rules expanding tort liability."[11]

It is this denial of *equality* of which petitioners complain, on their own behalf and on behalf of similarly situated claimants in Virginia and elsewhere. That the problem is indeed nationwide is documented by the misreading by the court below of the law of allegedly "prospective-only" states, only *some of* whose decisions (although others were cited in the briefs) it mentions in its opinions (pp. 19-20 *infra*).

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[11] 51 Va. L. Rev. at 201, 244-45, discussed in Fountain Brief, pp. 6, 8; Fountain Reply Brief, p. 2.

It was clearly pointed out in Fountain Opening Brief, pp. 5-6, and Fountain Reply Brief, pp. 6-7, that:

Darrow v. *Hanover*, 58 N.J. 410, 278 A.2d 200, 201, 207 (1971), simply denied recovery for a 1967 accident, occurring about a year *before* that involved in the overruling decision of *Immer* v. *Risko*, 56 N.J. 283, 267 A.2d 481 (1970); *Darrow* was followed by *Gotsch* v. *Gotsch*, 63 N.J. 217, 306 A.2d 433, 435 (1973), where the court *allowed* suit by a spouse hurt *before Immer* was decided because in the *Gotsch* case, like those of petitioners here, there was "no reliance by the insurance company" on prior law; and until shortly before the *Immer* accident, New Jersey's standard auto policy *expressly excluded* coverage for "any member of the family of the insured." 278 A.2d at 203.

Similarly in *Beaudette* v. *Frana*, 285 Minn. 366, 173 N.W.2d 415, 418 (1969), which made an earlier overruling decision *not* retrospective to cover accidents occurring before that in the earlier case, the court there took pains to point out that it was not *until 1969* that a Minnesota statute *forbade* exclusion of relatives from auto insurance coverage;[12] later *Eicher* v. *Jones*, 285 Minn. 409, 173 N.W.2d 427 (1970), allowed suit for an accident occurring *before* that involved in *Silesky* v. *Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968), *Beaudette's* twin, and *Barile* v. *Anderson*, ... Minn. ....., 203 N.W.2d 366 (1972), allowed suit

[12] No such candor obtained between respondents herein and State Farm (p. 4 *supra*), although the secretly excluded petitioners obviously were among "those whom the insured would most desire to protect." *Xaphes* v. *Mossey*, 224 F. Supp. 578, 579 (D. Vt. 1963).

for an accident occurring *after* those in *Beaudette* and *Silesky* but *before* the *decisions* in those cases.[13]

The equal protection clause does *not* require total retroactivity, as decreed in *Gelbman* v. *Gelbman*, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194 (1969), because by abolishing intrafamily tort immunity the court did *not* create "liability where none previously existed" but rather permitted "recovery previously denied, where liability has been established."[14]

It requires only retroactivity to cover injuries occurring (like here) *after* the date of the injury involved in the overruling decision, as established in the course of two rehearings in *Rigdon* v. *Rigdon*, 465 S.W.2d 921 (Ky. 1971). The original *Rigdon* opinion of December 18, 1970, did *not* deal with the retrospective-prospective issue. The order

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[13] Citation by the court below of *Vickers* v. *Vickers*, 109 N.H. 69, 242 A.2d 57 (1968), also failed to mention that *Vickers* held only that retroactivity would not be given to permit suit for an accident occurring *before* that involved in the earlier overruling decision of *Briere* v. *Briere*, 107 N.H. 432, 224 A.2d 588 (1966). Its mention of *Goller* v. *White*, 20 Wis.2d 402, 122 N.W.2d 193 (1963), inexplicably omitted the explanation in *Fitzgerald* v. *Miessner*, 38 Wis.2d 571, 157 N.W.2d 595, 598 (1968), that *Goller* denied retroactive application of permission of suit by child against parent *solely* because it could have resulted in suits *by minors* for injuries occurring 20 years before. This was, of course, a groundless fear. As a Virginia trial judge pointed out, the problem of whether suits for "accidents which occurred 5, 10, 15 or more years ago" should be permitted can be met when such a suit is filed. Fountain Opening Brief, pp. 5, 6, 14. A better solution is that adopted by Kentucky, Texas and California, p. 12, *infra*. These important facts were stressed below in Fountain Opening Brief, pp. 5-6; Fountain Reply Brief, pp. 5-7, and orally.

[14] The Virginia bar reasonably could have thought this was the rationale of *Smith* and *Surratt*, since in *Worrell* v. *Worrell*, 174 Va. 11, 22, 23, 4 S.E.2d 343, 348 (1939), cited in both *Smith* and *Surratt*, the court said intrafamily immunity arose "from a disability to sue, and not from lack of violated duty." Two Virginia trial judges noted the soundness of the *Worrell-Gelbman* rationale. Fountain Brief, pp. 11, 14, 16-17.

on rehearing of February 26, 1971, said *Rigdon* would apply only to causes of action arising *after* that date. But after intervention by infants with actions pending, who were hurt *before* the latter date, and *after* the date of the *Rigdon* accident, the court *again* modified its opinion and applied its decision overruling parental immunity to the case at bar and *also* to "all other cases in which the injury complained of occurred on or after May 9, 1969, *the date of the accident in the present case,* 465 S.W.2d at 923, thus avoiding the equal protection question created by its first rehearing decision.[15] Texas, citing *Rigdon,* similarly allowed the limited, equality-based retroactivity petitioners contend for here. *Felderhoff* v. *Felderhoff,* ..... Tex. ....., ..., 473 S.W.2d 928, 933 (1971). And see *Jones* v. *Los Angeles,* 215 Cal. App.2d 155, 30 Cal. Rptr. 124, 125 (1963), which permitted suit for assault by police officers occurring before the decision in the case abolishing the doctrine of governmental immunity but after the date of the acts upon which the claim involved in that decision was based, because plaintiff's cause of action was a vested right of which he could not be deprived by later state "moratorium" legislation temporarily re-enacting the immunity doctrine and suspending the effect of the overruling decision.

When the court said that the *Smith* and *Surratt* claimants, injured in 1968, *could* recover, and also those similarly situated who were hurt after September 1, 1971, date of the *Smith* and *Surratt* opinions, but that those similarly situated and injured between these dates may not, denial to them of the right to litigate—including the right to seek, as the *Surratt* claimant was allowed, to *overturn* the old

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[15] All parties relied below on *Rigdon*. Spencer Fountain Brief, pp. 7, 10, incorporated in Junius Jackson's Brief, p. 34; Eunice Fountain Reply Brief, pp. 5, 6, 8. *Rigdon* was cited but not discussed by the court below (p. 19 *infra*).

immunity doctrine—also violates the requirement of equal protection placed in a *procedural* context as in, e.g., *Stanley* v. *Illinois*, 405 U.S. 653, 658 (1972), and *Lindsey* v. *Normet*, 405 U.S. 862, 876 (1972), where this Court held in another context: "When an appeal is afforded . . . it cannot be granted to *some* litigants and capriciously or arbitrarily denied to *others* without violating the equal protection clause," citing many cases. In *Smith* and *Surratt* claimants were afforded appeals to attack the rule that they could not sue father and spouse; petitioners here, although allowed to go through the expensive formality of appeal, found this right an empty shell, for they were capriciously denied the right to try to change prior law the earlier accident victims had enjoyed. Similarly analogous is the holding that a judicial system which allows a legitimate child, but *not* an illegitimate one, *to litigate* his alleged right to support from his father discriminates invidiously contrary to the equal protection clause. *Gomez* v. *Perez*, 409 U.S. 535 (1973).

This denial similarly deprives petitioners of their property without *procedural* due process.

"When a state court overrules a consistent line of *procedural* decisions with the *retroactive* effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive rights.'" *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1930); *Bouie* v. *Columbia*, 378 U.S. 347, 354 (1964).

The court below frankly reversed,[16] and *retrospectively* applied this abrupt change *to petitioners*, the rule it set down long ago in *Saffel* v. *Orr*, 109 Va. 769, 774, 64 S.E. 1057, 1059 (1909), that:

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[16] 214 Va. at 348, 200 S.E.2d at 513, p. 18 *infra*.

" 'The effect of overruling a decision and refusing to abide by the precedent there laid down is retroactive and makes the law at the time of the overruled decision as it is declared to be in the last decision.' 26 Am. & Eng. Enc. L. 179."

The encyclopedia reference makes it clear that this is an English common law principle imported to Virginia by its reception statute.[17] The *Saffel* pronouncement, reaffirmed in *Memorial Hospital* v. *Oakes*, 200 Va. 878, 889, 108 S.E.2d 388, 396 (1959), and *denial* of a rehearing in *Smith* v. *Kauffman*, where defendant sought to make that ruling prospective only,[18] surely led the bar to justifiably rely on the common law principle of retroactivity in deciding to go to the expense of trial after *Smith* and *Surratt* were decided.

It has been suggested that limiting retroactivity to the successful claimant in the overruling decision, as the Virginia Court has done, is justified as a "reward" to that claimant and his counsel for succeeding in law reform.[19] If such a distinction could possibly be supported under any circumstances, it is unusually strange to apply it here where both petitioners had as trial and appellate counsel the same attorney who was trial and appellate counsel in *Smith* v. *Kauffman*, in which Virginia abolished parental immunity.[20]

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[17] Code of Virginia (1950), § 1-10, quoted at p. 3 *supra*. See Currier, *supra*, 51 Va. L. Rev. at 205, quoting Mr. Justice Holmes: "Judicial decisions have had retrospective operation for near a thousand years." See also Fountain Brief, p. 6.

[18] This was pointed out below in Jackson Brief, p 6; Fountain Brief, p. 6.

[19] E.g., *Molitor* v. *Kaneland Community Unit District*, 18 Ill.2d 11, 28, 163 N.E.2d 89, 97 (1959), discussed and criticized in *Currier supra*, 51 Va. L. Rev. at 214-5. This bizarre theory was also cited by a Virginia trial judge, Fountain Brief, p. 21.

[20] *Surratt* v. *Thompson*, overruling interspousal immunity the same day, depended almost entirely for its rationale on *Smith*. 212 Va. at 194, 183 S.E.2d at 202.

He filed suit attacking interspousal immunity on behalf of Petitioner Jackson 4 months *before Smith* and *Surratt* were decided.[21] Petitioners cannot constitutionally be denied the rights the *Smith* and *Surratt* claimants were given—i.e., to attack the admittedly anachronistic immunity doctrine—solely because petitioners were hurt, and filed, later, as the courts of Kentucky, Minnesota, Texas and California have appreciated (pp. 10-12 *supra*).

Procedural due process is further violated by the court's *assumption* that the discrimination it enforced was justified because it was "*conceivable* that persons would rely on the existing state of the law in determining what financial protection they needed; and that insurance companies . . . also justifiably relied on the existing law in evaluating the risk entailed, the premiums to be charged, and in deciding whether to investigate an accident. . ." 214 Va. at 349, 200 S.E.2d at 514 (p. 20 *infra*), flatly ignoring the uncontradicted evidence in the record in petitioners' cases which proves there was no such justifiable "reliance." This was an unfair and constitutionally impermissible exemption of petitioners and respondents from the general Virginia rule that a court may not render a judgment based on arbitrary disregard of the uncontradicted evidence before it.[22]

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[21] Original Record, p. 1.

[22] *Hodge* v. *American Family Life Assurance Co.*, 213 Va. 30, 31, 189 S.E.2d 351, 353 (1972). If it should be argued that the court gave weight to the suspiciously almost verbatim *ex parte* affidavits somebody drafted for the signatures of claimsmen in other cases (Appendix below, pp. 33-40) saying that in intrafamily claims some companies had tried to save money by eschewing normal investigations, notwithstanding the easily predictable fact that these immunities were on the way out (Fountain Opening Brief, pp. 7-8), it would have to be by the court below ignoring in petitioners' case only its long-standing rule that affidavits consisting of obviously lawyer-manufactured "evidence" signed by compliant witnesses should be treated with contempt and ignored as nullities. *Griffin* v. *Tomlinson*, 159 Va. 161, 170, 165 S.E. 374, 377 (1932).

CONCLUSION

Certiorari should be granted and the judgments below reversed, with directions to enter judgment on the verdict in favor of petitioner Jackson and to grant petitioner Fountain a new trial.

Respectfully submitted.

JAMES A. EICHNER
Allen, Allen, Allen & Allen
1809 Staples Mill Road
Richmond, Virginia 23230

Counsel for Petitioners

APPENDIX A

OPINIONS OF SUPREME COURT OF VIRGINIA

EUNICE S. FOUNTAIN

v.

SPENCER FOUNTAIN

Record No. 8238

November 26, 1973

From the Law and Equity Court of the City of Richmond[1]

Richard L. Williams, Judge

I'Anson, J.

The sole question presented on this appeal is whether our decision in *Surratt, Adm'r* v. *Thompson,* 212 Va. 191, 183 S.E.2d 200, rendered on September 1, 1971, abolishing the inter-spousal immunity doctrine in actions for personal injuries resulting from motor vehicle accidents, should be given retrospective or prospective effect.

Plaintiff, Eunice S. Fountain, sought damages against Spencer Fountain, her husband, and others, for personal injuries sustained on August 11, 1970, when an automobile driven by her husband, in which she was a passenger, collided with a car operated by another.

The trial court held that the *Surratt* decision would be accorded prospective effect only from the time it was rendered, and entered summary judgment for the defendant, Spencer Fountain. We granted plaintiff a writ of error to the judgment.

Plaintiff contends that the rule of *Surratt, supra,* should be given retrospective effect to August 11, 1970, the date of her accident.

[1] Now Circuit Court of the City of Richmond, Division I.

The traditional rule is that a decision abolishing an old common law rule is normally given retroactive effect. *Saffell* v. *Orr*, 109 Va. 768, 774, 64 S.E. 1057, 1059 (1909); Annot., "Prospective or Retroactive Operation of Overruling Decision," 10 A.L.R.3d 1371, 1377-78, 1382-83 (1966); Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 Va.L.Rev. 201, 205-06 (1965). But the modern rule followed by most courts is to "treat the question of how an overruling decision should operate as one of judicial policy rather than of judicial power, and recognize that varying results may be reached, depending upon the particular circumstances presented and the particular rule affected." 10 A.L.R.3d at 1378, 1383-84; 51 Va.L.Rev. at 206, *et seq.*

We have held in cases involving the criminal area that certain new constitutional rights are accorded only prospective effect. In doing so we followed the criteria pronounced in *Linkletter* v. *Walker*, 381 U.S. 618, 636 (1965), and *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967), namely: that consideration should be given to the purpose of the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule. *Bridgers* v. *Commonwealth*, 211 Va. 370, 371, 177 S.E.2d 526, 527 (1970). *See also Cradle* v. *Peyton*, 208 Va. 243, 247, 156 S.E.2d 874, 877 (1967), *cert. denied* 392 U.S. 945 (1968).

The Supreme Court of the United States has " 'recognized the doctrine of nonretroactivity outside the criminal area many times in both constitutional and nonconstitutional cases.' " *Lemon* v. *Kurtzman*, 411 U.S. 192, 197 (1973). There Mr. Chief Justice Burger said:

> "[S]tatutory or even judge-made rules of law are hard facts on which people must rely in making decisions and

> in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of non-retroactivity." 411 U.S. at 199.

The precise question presented in the case at bar has not been before us. But a majority of courts of other jurisdictions that have abolished intra-family immunity have held that their decisions shall have prospective effect only from the date they were rendered because of justifiable reliance on the doctrine by defendants or their insurers. *Darrow* v. *Hanover Township*, 58 N.J. 410, 278 A.2d 200 (1971) (inter-spousal immunity); *Beaudette* v. *Frana*, 285 Minn. 366, 173 N.W.2d 416 (1969) (inter-spousal immunity); *Vickers* v. *Vickers*, 109 N.H. 69, 242 A.2d 57 (1968) (child-parent immunity); *Silesky* v. *Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968) (child-parent immunity); *Gollar* v. *White*, 20 Wis.2d 402, 122 N.W.2d 193 (1963) (parent-child immunity). *But see Gelbman* v. *Gelbman*, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969), which held that the new rule abolishing intra-family tort immunity for non-willful torts should be applied retrospectively to matters which have not gone to final judgment. *Cf. Rigdon* v. *Rigdon*, 465 S.W.2d 921, 923 (Ky.Ct.App. 1971), in which the child-parent immunity rule was abolished and the court held on a rehearing that the new rule would apply from the date of the accident in that case.

The Supreme Court of New Jersey, before deciding in *Darrow*, *supra*, whether *Immer* v. *Risko*,[2] 56 N.J. 482, 495, 267 A.2d 481, 488 (1970), which abrogated the doctrine of inter-spousal immunity in automobile negligence cases,

---

[2] Cited and followed by us in *Surratt*, and *Smith* v. *Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971) (child-parent immunity.)

should have retrospective or prospective effect, invited members of the bar and other interested parties to submit briefs and appear as *amici curiae* because of the importance of the question.

In holding that *Immer* should have prospective effect only from the date of the decision, the court reasoned in *Darrow* that there had been justifiable reliance on earlier decisions upholding inter-spousal immunity. Thus it was entirely conceivable that persons would rely on the existing state of the law in determining what financial protection they needed; and that insurance companies providing protection for their insureds also justifiably relied on the existing law in evaluating the risk entailed, the premiums to be charged, and in deciding whether to investigate an accident involving their insureds while the witnesses were available and the facts were fresh on their minds. The court further reasoned that aside from protecting those who justifiably relied on inter-spousal immunity, prospective application of *Immer* would foster stability in the law, "since it would avoid the necessity of opening claims which have gone stale because of a failure to properly investigate. Prospectivity permits the courts to introduce important changes in the law with minimal disruption; it will not affect past conduct or relationships." 58 N.J. at 419, 278 A.2d at 205.

We agree with the reasoning of the New Jersey court and the majority of the other courts that the rule abrogating inter-spousal immunity shall be given prospective effect only from the date of the decision announcing the new rule. Hence we disagree with the contention that the rule in *Surratt* should be given retrospective effect to the date of plaintiff's accident, which occurred nearly a year before our holding in *Surratt*.

For the reasons stated, the judgment of the court below is

Affirmed.

JUNIUS I. JACKSON

v.

EVA VENUS LYLES JACKSON

Record No. 73-0192
November 26, 1973
From the Circuit Court of Lunenburg County
Meredith C. Dortch, Judge

Per Curiam

The question presented in this case is whether the trial court erred in overruling the plea of inter-spousal immunity filed by the defendant, Junius I. Jackson, in an action brought against him by Eva Venus Lyles Jackson, plaintiff, to recover damages for personal injuries sustained by her in an automobile accident which occurred while the parties were husband and wife.

The plaintiff obtained a jury verdict in the amount of $8,000, and judgment was entered thereon.

The material facts show that the parties were married on June 28, 1969; that they were divorced from the bonds of matrimony on November 4, 1971; and that the accident in which the plaintiff sustained personal injuries occurred on August 9, 1970.

This case is controlled by our decision in *Fountain* v. *Fountain*, this day decided. There we held that the rule in *Surratt, Adm'r* v. *Thompson*, 212 Va. 191, 183 S.E.2d 200 (September 1, 1971), abolishing inter-spousal immunity in automobile accident cases, was to be given only prospective effect from the date of the *Surratt* decision. Hence the trial court erred in giving *Surratt* retroactive effect by over-

ruling the plea of inter-spousal immunity and in not dismissing the action.

The judgment of the court below is reversed and final judgment is here entered for the defendant, Junius I. Jackson.

Reversed and final judgment.

APPENDIX B

OPINION OF TRIAL COURT IN JACKSON CASE

Meredith C. Dortch
Judge Thirty-Fourth Judicial Circuit
South Hill, Virginia 23970

September 29, 1972

Re: *Eva Venus Lyles Jackson* v. *Junius Jackson*

The plea of interspousal immunity filed in this case will be denied. Plaintiff's counsel will prepare the proper order. This case is set for trial on October 4 and I will assume that it will be tried on that date.

MEREDITH C. DORTCH

APPENDIX C

JUDGMENTS OF SUPREME COURT OF VIRGINIA

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 26th *day of* November, 1973.

Eunice S. Fountain
against
Spencer Fountain,

Record No. 8238

Upon a writ of error to judgments rendered on the 12th day of October, 1972, the 16th day of October, 1972, and the 17th day of October, 1972, by the Circuit Court of the City of Richmond, Division I, formerly the Law and Equity Court of the City of Richmond.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgments aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgments complained of insofar as they pertain to Spencer Fountain. It is therefore adjudged and ordered that the said judgments, insofar as they pertain to Spencer Fountain, be, and the same are hereby, affirmed, and that the plaintiff in error pay to the said Spencer Fountain thirty dollars damages, and also his costs by him expended about his defense herein.

A writ of error to the aforesaid judgments was refused

as to William T. Tucker, Jr., and John Doe on April 27, 1973.

Which is ordered to be certified to the said circuit court.

A Copy,

Teste:

/s/ H. G. TURNER
Clerk

Note:

The above order has not been certified to the court below. Execution thereof was stayed on January 4, 1974, pending application for writ of certiorari to the Supreme Court of the United States.

/s/ H. G. TURNER
Clerk

January 4, 1974

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 26th *day of* November, 1973.

Junius I. Jackson,
against
Eva Venus Lyles Jackson,

Record No. 730192

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of Lunenburg County on the 20th day of November, 1972.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the

record, that there is error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be reversed and annulled, the verdict of the jury set aside, and that the plaintiff in error recover of the defendant in error his costs by him expended about the prosecution of his writ of error and supersedeas aforesaid here.

And this court proceeding to enter such judgment as to it seems right and proper, doth adjudge and order that the defendant in error take nothing by her motion for judgment, and that the plaintiff in error go thereof without day and recover of the defendant in error his costs in said circuit court expended.

Which is ordered to be certified to the said circuit court.

A Copy,

Teste:

/s/ H. G. TURNER
Clerk

Note:

The above order has not been certified to the court below. Execution thereof was stayed on January 4, 1974, pending application for writ of certiorari to the Supreme Court of the United States.

/s/ H. G. TURNER
Clerk

January 4, 1974

APPENDIX D

ORDERS OF TRIAL COURT AND ASSIGNMENTS OF ERROR IN FOUNTAIN CASE

ORDER
(Entered October 16, 1972)

On October 5, 1972 came the parties to this action on the Motion for Summary Judgment of defendant Spencer P. Fountain and, having heard argument of counsel and considered the evidence and exhibits, the Court doth sustain said Motion for Summary Judgment and doth Order that this action as to the defendant Spencer P. Fountain be dismissed.

To which action of the Court the plaintiff, Eunice S. Fountain, and the defendants, William T. Tucker, Jr. and John Doe, objected and excepted, upon the grounds that decisions of the Virginia Supreme Court required retrospective application of the change in tort law; that the evidence in this action shows no reliance by defendant Fountain or his insurer upon the law existing prior to September 1, 1971; any prejudice to him or his insurer from lack of investigation of relevant facts, or any adverse effect on insurance rates which would arise out of allowing this action against defendant Fountain, and that to disallow this action against him would deprive plaintiff and defendants John Doe and Tucker of property without due process of law, of equal protection of the laws, and of trial by jury, contrary to the Fourteenth Amendment to the United States Constitution and Section 11 of the Virginia Constitutions of 1902 and 1971 and for other reasons stated by plaintiff's counsel at the hearing of October 5, 1972.

* * *

ORDER
(Entered October 17, 1972)

This day came again the parties, by their attorneys, and came also the jury sworn in this case, pursuant to their adjournment on yesterday, and having fully heard the evidence and argument of counsel were sent out of Court to consult of a verdict and after some time returned into Court with a verdict in the words following, to-wit: "We, the jury, on the issue joined, find for the defendants."

Thereupon the plaintiff, Eunice S. Fountain, by her attorney, moved the Court to vacate the order entered by the Court on October 16, 1972, entering summary judgment for the defendant, Spencer P. Fountain, and to set aside the verdict of the jury on the grounds that this is contrary to the law and the evidence or in the alternative award her a new trial on all issues against the defendants, William T. Tucker, Jr., and John Doe on the grounds that the verdict is contrary to the law and the evidence, for misdirection of the jury by the Court and for other errors committed by the Court during the course of the trial as noted in the Reporter's Transcript of the evidence, which motions the Court overrule.

Therefore, it is considered by the Court that the plaintiff recover nothing of the defendants, William T. Tucker, Jr., and "John Doe," but that the defendants recover of the plaintiff their costs by them about their suit in this behalf expended.

* * *

ASSIGNMENTS OF ERROR

1. The Court erred in sustaining the motion for summary judgment of defendant Spencer Fountain.

2. The Court errred in overruling plaintiff's motion

after verdict to vacate said judgment, and to grant a new trial as to defendant Fountain.

* * *

APPENDIX E

EXCERPTS FROM COMPLAINTS IN SMITH v. KAUFFMAN AND SURRATT v. THOMPSON

MOTION FOR JUDGMENT

1. The infant plaintiff was born Christine Mann on September 7, 1960, daughter of Bobby Ray Mann and Dorothy Mann.

2. On or about April 4, 1963, said Bobby and Dorothy Mann were divorced.

3. The said Dorothy Mann married Raymond B. Smith on March 24, 1964.

* * *

9. *On or about August 18, 1968*, the said Raymond Smith was operating a certain Volkswagen automobile, in which the infant plaintiff was riding, in an easterly direction on State Route 307 near its intersection with State Route 617 in Prince Edward County, Virginia.

* * *

12. As a result of the negligence of said Raymond Smith and the negligence of defendant Randal, said Volkswagen was caused to strike the rear of said Chevrolet automobile with great force and violence.

13. As a direct and proximate result thereof, the infant plaintiff was caused to sustain serious and permanent physical injuries, has suffered great pain of body and mind, has

suffered permanent disability, and her mother has had to expend in the past, and will have to expend in the future, large sums of money for hospital, doctors and related medical expense in an effort to cure her of said injuries.

* * *

MOTION FOR JUDGMENT

The plaintiff moves the Court to enter judgment against the defendants in the sum of $40,000.00 by virtue of the following facts:

1. That on or about the *23rd day of June, 1968*, at about 1:00 o'clock P.M., the plaintiff's decedent, Cordelia Jane Surratt, was a passenger in a motor vehicle driven by her husband, the defendant, Oscar Lee Surratt, which vehicle was proceeding in a southwesterly direction upon U.S. Highway No. 221 toward the Town of Hillsville in Carroll County, Virginia, about 6 miles northeast of said Town of Hillsville, and in the proximity of the bridge crossing Big Reed Island Creek.

* * *

7. That the defendant, Oscar Lee Surratt, owed a duty to the plaintiff's decedent not to pass another vehicle at the intersection of highways, to maintain a proper lookout, to drive his vehicle at a reasonable speed under all circumstances and to maintain said vehicle under proper control; and,

8. That the defendant, Oscar Lee Surratt, failed to carry out said duties to the plaintiff's decedent, which amounted to gross negligence upon his part, and that as a proximate result of the gross negligence of the defendant, Oscar Lee Surratt, the plaintiff's decedent was killed;

* * *

BRIEF FOR THE RESPONDENTS IN OPPOSITION

LIBRARY,
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Supreme Court, U. S.
FILED
MAR 15 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73-1282

EUNICE S. FOUNTAIN AND EVA L. JACKSON,

Petitioners,

v.

SPENCER FOUNTAIN AND JUNIUS I. JACKSON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

J. SEGAR GRAVATT
105 East Elm Street
Blackstone, Virginia

W. E. NEBLETT
Lunenburg, Virginia

J. B. BROWDER
RUFUS G. COLDWELL, JR.
Browder, Russell, Little, Morris & Butcher
1510 Ross Building
801 East Main Street
Richmond, Virginia 23219

Counsel for Appellees

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In The

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October Term, 1973

No. 73-1282

EUNICE S. FOUNTAIN AND EVA L. JACKSON,

Petitioners,

v.

SPENCER FOUNTAIN AND JUNIUS I. JACKSON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

For reasons hereinafter stated, the respondents respectfully submit that this Court should deny the Petition for Writs of Certiorari in this case.

OPINIONS BELOW

Opinions below are reported, *Fountain* v. *Fountain,* 214 Va. 347, 200 S.E.2d 513, *Jackson* v. *Jackson,* 214 Va. 351, 200 S.E.2d 515 and are printed in the petitioner's Appendix.

QUESTION PRESENTED

Is the Fourteenth Amendment to the Constitution of the United States violated when the highest state court, by opinion dated September 1, 1971, overrules the former com-

mon law immunity of spouses from suits against each other for negligent injury by motor vehicle and allows a plaintiff in the overruling case to recover against her husband for such injuries suffered in 1968 and subsequently decides that the overruling decision shall be given prospective effect as to all other spouses?

RELEVANT FACTS

The only facts relevant to resolve the question presented are the following:

In *Surratt* v. *Thompson*, 212 Va. 191, 183 S.E.2d 200 (Sept. 1, 1971) overruling interspousal immunity, the plaintiff, who was allowed to recover, was injured on June 23, 1968 and in the companion case of *Smith* v. *Kauffman*, 212 Va. 181, 183 S.E.2d 190 (Sept. 1, 1971), the child, allowed to recover against its parent, was injured on August 18, 1968.

By virtue of the decision of the Supreme Court of Virginia in *Jackson* v. *Jackson, supra*, and *Fountain* v. *Fountain, supra*, both rendered on November 26, 1973, the Supreme Court of Virginia declared that only spouses injured after the date of its opinion should enjoy the benefits derived from its decision overruling the doctrine of immunity.

The plaintiff in *Jackson* was injured on August 9, 1970 and the plaintiff in *Fountain* was injured on August 11, 1970.

ARGUMENT

It is the contention of the petitioners that the Supreme Court of Virginia should have given limited retroactive effect to its decision in *Surratt* v. *Thompson, supra*, so as to include the two plaintiffs in this case who were injured

in August, 1970 and to permit them to recover against their spouses.

In *Sperry & Hutchinson Co.* v. *Rhodes,* 220 U.S. 502 (1911), New York enacted a statute making it unlawful to use a person's photograph for advertising without his consent. A damage suit was instituted under this statute for the unlawful use of the plaintiff's photograph. The defendant claimed in the Supreme Court that photographs taken before the date of the enactment of the statute could be used without the consent required by the statute.

Mr. Justice Holmes, in disposing of the contention, stated "But the Fourteenth Amendment does not forbid statute or statutory changes to have a beginning and thus to discriminate between the rights of an earlier and a later time."

The decision of this Court in *Great Northern R. R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932), decided the question here before the Court. In that case a Minnesota statute empowered its railroad commission to fix freight rates for intrastate shipment. Such rates could be changed by the board itself or upon complaint of either shipper or carrier, if found to be unreasonable.

The Supreme Court of Montana considered this statute in a prior decision *Doney* v. *Northern P. R. Co.,* 60 Mont. 209, 199 Pac. 432 (1921) and the Court there held that recovery by a shipper of unreasonable rates was permitted under the statute but that application had to be made to the board or a suit instituted against the board for determination of the unreasonable nature of the rate and that this was a condition precedent to the institution of a suit for recovery of excess charges.

Subsequently Sunburst Oil Company followed the procedure required by the prior decision and procured a ruling of the Railroad Commission holding certain rates charged by Northern Pacific unreasonable and thereafter Sunburst

filed suit to recover charges for the period August, 1926 through August, 1928.

The Supreme Court of Montana held that its ruling in *Doney* was erroneous in that a determination of the commission or the Court that a rate was unreasonable would not give a right to recover for past excessive charges but nonetheless it held that *Doney* was applicable law until reversed and granted a judgment in favor of Sunburst for the excess payment from 1926 through 1928.

Great Northern brought the case to the Supreme Court raising the question ". . . whether the annulment by retroaction of rates valid when exacted is an unlawful taking of property within the Fourteenth Amendment." 287 U.S. at 359. Upon this issue the Court spoke through Mr. Justice Cardoza in authoritative language giving complete latitude for the highest state court to make its own choice as to the application of its overruling decision without Constitutional restraint:

> "We think the posture of the case from the viewpoint of the constitutional law was the same after the decision of the appeal as it was after the trial. There would certainly have been no denial of due process if the court in affirming the judgment had rendered no opinion or had stated in its opinion that the Doney Case was approved. The petitioner is thus driven to the position that the Constitution of the United States has been infringed because the Doney Case was disapproved, and yet, while disapproved, was followed. Adherence to precedent as establishing a governing rule for the past in respect of the meaning of a statute is said to be a denial of due process when coupled with the declaration of an intention to refuse to adhere to it in adjudicating any controversies growing out of the transactions of the future.
>
> "We have no occasion to consider whether this division in time of the effects of a decision is a sound or

an unsound application of the doctrine of stare decisis as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the Federal constitution. This is not a case where a court in overruling an earlier decision has given to the new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing. Even that may often be done, though litigants not infrequently have argued to the contrary. (citations omitted) This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.

"We think the Federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions. Indeed, there are cases intimating too broadly (citation omitted) that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. (citations omitted) On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. (citations omitted) The alternative is the same whether the subject of the new decision is common law or statute. (citations omitted) The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of the law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring com-

> mon law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process." 287 U.S. at 363-366.

In *Moliter* v. *Kaneland Comm. Unit District*, 18 Ill.2d 11, 163 N.E.2d 89 (1959), the Supreme Court of Illinois abolished its former rule making school districts immune from liability for negligent torts. After declaring that it had a free choice to make its decision retroactive or prospective in operation, it granted the plaintiffs, in the overruling case, judgment and declared its decision otherwise prospective only. This Court denied certiorari.[1]

The Court below in its opinion cited *Linkletter* v. *Walker*, 381 U.S. 618. The petitioner suggests that *Linkletter* v. *Walker* is not apt authority for the question here before the Court. (Pet. br. pp. 7 and 8) We disagree.

This Court having decided *Mapp* v. *Ohio*, 367 U.S. 643, requiring the exclusion in state criminal trials of evidence

[1] Numerous cases making the overruling decision applicable to its parties but prospective as to all others are collected and discussed in *Annotation Overruling Decision—Application*, 10 A.L.R.3d 1371, § 8(b) 1395.

seized in violation of the search and seizure provisions of the Fourth Amendment thus reversing *Wolf* v. *Colorado*, 338 U.S. 25, was dealing with a situation which raised a similar question to that here before the Court.

Linkletter was convicted in a Louisiana State Court on May 28, 1959. *Mapp* v. *Ohio* was announced on June 19, 1961. Linkletter sought a writ of habeas corpus in the state courts and through the lower federal courts and was denied and the case came to this Court. In deciding *Mapp* v. *Ohio*, the Court applied its new rule to Mapp and overruled his conviction. It refused to give *Mapp* general retroactive effect stating "In short, we must look to the purpose of the Mapp ruling; the reliance placed upon the Wolf doctrine; and the effect on the administration of justice of of a retroactive application of Mapp." 381 U.S. at 636.

The majority opinion closes with these words:

> "Nor can we accept the contention of petitioner that the Mapp rule should date from the day of the seizure there, rather than that of the judgment of this Court. The date of the seizure in Mapp has no legal significance. It was the judgment of this Court that changed the rule and the date of that opinion is the crucial date. In the light of the cases of this Court this is the better cutoff time." 381 U.S. at 369.

thus rejecting a contention similar to that here made that the cutoff time should be the date of the injuries of these two plaintiffs rather than the date upon which the Supreme Court of Virginia announced the decision abolishing the former rule. Bearing in mind that Linkletter was convicted in a state court, the provisions of the Fourteenth Amendment applied.

The dissenting opinion of Mr. Justice Black clearly shows that this Court considered a factual situation almost iden-

tical to those here presented with respect to the Fourteenth Amendment rights of these petitioners and rejected them.

> "Linkletter, convicted in the state court by use of 'unconstitutional evidence,' is today denied relief by the judgment of this Court because his conviction became 'final' before Mapp was decided. Linkletter must stay in jail; Miss Mapp, whose offense was committed before Linkletter's is free. This different treatment of Miss Mapp and Linkletter points up at once the arbitrary and discriminatory nature of the judicial contrivance utilized here to break the promise of Mapp by keeping all people in jail who are unfortunate enough to have had their unconstitutional convictions affirmed before June 19, 1961." 381 U.S. 641.

The foregoing and much more is said in the dissenting opinion with respect to the discrimination between Mapp and Linkletter but the Court did not accept these contentions of Fourteenth Amendment inequality.

In the majority opinion, the Court discussed the historica background of retroactive application of overruling decisions and the changes in those rulings which have taken place and concluded:

> "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. 629.[2]

[2] Later cases making a similar declaration of freedom to apply an overruling decision retrospectively or prospectively are *Tehan* v. *U.S.*, 382 U.S. 406 (1966), reh. den. 383 U.S. 931; *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) reh. den. 385 U.S. 890; *England* v. *Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964); and *James* v. *U.S.*, 366 U.S. 213 (1961); *Desist* v. *U.S.*, 394 U.S. 244 (1969) and see *Stovall* v. *Denno*, 388 U.S. 293 (1967) suggesting that Article 3

Facts Supporting Lower Court Policy

This Court has stated broadly the criteria which should be followed in determining the retroactive application of a new rule:

(1) The purpose to be served;

(2) The extent of reliance; and

(3) The effect on the administration of justice.

Linkletter v. *Walker, supra; Tehan* v. *U.S., supra; Stovall* v. *Denno, supra; Desist* v. *U.S., supra.*

I.

THE PURPOSE TO BE SERVED

The opinions in *Smith* v. *Kauffman, supra,* and *Surratt* v. *Thompson, supra,* were companion opinions. *Smith* v. *Kauffman,* being the more extensive in its recitation of the changes which brought about the abolishment of the doctrine of parental and interspousal immunity, describes these changes:

> "The enactment of Virginia uninsured motorists laws in 1958 has effected a further and major change of circumstances. One of these laws requires an uninsured motor vehicle endorsement to each policy of automobile liability insurance issued or delivered by an insurer licensed in this State covering a motor vehicle principally garaged or used in this State. Va. Code Ann. § 38.1-381 (1970). Under the endorsement, the insurer must agree to pay to the insured all sums that he may be legally entitled to recover as damages from the owner or operator of an uninsured motor

of the Constitution requiring the Court to resolve issues solely in concrete cases and controversies militates against making a new rule purely prospective so as not even to apply in the case in which it is announced.

vehicle or unknown operator of a motor vehicle, within the limits prescribed by statute: $20,000 for bodily injury to or death of any one person and $30,000 for bodily injury to or death of two or more persons in any one accident, and $5,000 for damage to property in any one accident. Va. Code Ann. §§ 38.1-381(b) (1970) and 46.1-1(8) (Supp. 1971).[3]

"A complementary law, first enacted in 1958, encourages the obtaining of insurance coverage by requiring that every person who seeks registration of an 'uninsured motor vehicle' pay a $50 fee to the State Uninsured Motorists Fund. This fee must be paid as a prerequisite to registration of a motor vehicle unless the vehicle has liability insurance coverage up to the limits described in the preceding paragraph or unless the owner (i) qualifies the vehicle as an 'insured motor vehicle' by giving a bond or depositing cash or securities in lieu of insurance or (ii) qualifies as a self-insurer. Va. Code Ann. §§ 46.1-167.2(b) (1967), -395 (1967), -504 (Supp. 1971). According to the records of the State Division of Motor Vehicles, only 1.57% of the motor vehicles registered in Virginia are 'uninsured motor vehicles.'[4]

"The very high incidence of liability insurance covering Virginia-based motor vehicles, together with the mandatory uninsured motorist endorsements to insurance policies, has made our rule of parental immunity anachronistic when applied to automobile accident litigation. In such litigation, the rule can be no longer supported as generally calculated to promote the peace and tranquillity of the home and the advantageous disposal of the parents' exchequer. A rule adopted for the common good now prejudices the great majority." 212 Va. 184, 185.

It therefore appears that the changes which developed over a period of time resulting in the almost universal in-

surance coverage referred to in the opinion makes prospective application fulfill the *purposes of the Court.*

Additionally, to go back in retrospect and fix a time when the prevalence of motor vehicle insurance outweighed the family harmony and financial considerations supporting family immunity would be extremely difficult and the fixing of a standard by which to determine that time would be wholly impractical, which suggests an extremely practical and important reason supporting the purpose of the abolishing decision by prospective application.

II.

THE EXTENT OF RELIANCE

The *extent of reliance* upon past law also supports a prospective policy. The evidence offered to the Court shows that insurance rates from year to year are based upon the incidence of loss of the immediately preceding year. Thus, to permit litigants of claims formerly thought to be barred would result in an increased burden in the form of insurance rates upon automobile operators in later years. It is apparent that injuries formerly barred would be given new life by retroactive application of the overruling decision. This would obviously result in the institution of many stale claims which had never been investigated and in which the evidence has disappeared, resulting in unfair, unjust and fraudulent claims.

In this connection, it makes no difference whatever that the petitioner says that one of the occurrences involved was investigated by the liability insurance carrier. The Court, in determining retroactive or prospective application, has to consider conditions and the interest of society in general rather than any particular accident or any particular litigant. Thus, prospective application gives regard to past reliance of the public upon the immunity involved.

III.

The Effect On The Administration Of Justice

The impact upon the *administration of justice* of retroactivity was recognized by the Supreme Court of Virginia in *Fountain* v. *Fountain, supra,* where it held that "stability in the law" would be fostered by prospectivity which would avoid the necessity of opening claims which have gone stale because of a failure to properly investigate.

Summary

So that prospective application is supported by the purpose of the Court to meet the changed conditions resulting from recent *universal public liability insurance* and other changes in Virginia motor vehicle insurance law, by *past reliance* upon the old rule and by the unknown *results upon the administration of justice* of the new rule.

The Equal Protection Argument

The simplest answer here is that Christine Marie Smith, an infant in *Smith* v. *Kauffman, supra,* and Mrs. Surratt's administrator in *Surratt* v. *Thompson, supra,* are unique legal entities. No other person can possibly be the plaintiff in the action in which the Supreme Court of Virginia overruled the common law doctrine of interspousal immunity and of parental immunity with respect to negligent injuries by motor vehicles. Neither Eunice S. Fountain nor Eva L. Jackson can claim to occupy that position and for either of them to attempt to do so as they here seek is pure fiction without substance.

It may be true that some courts have granted limited retroactivity based upon the date of the occurrence giving rise to suit in the overruling cases. The logic and reason of such decisions as to the "cutoff date," whatever it may be,

has no application to these cases. There is no more reason to pick August, 1968 as the cutoff date than to pick August, 1969 or August, 1967. As the Court said in *Linkletter*, "it was the judgment of this Court that changed the rule and the date of that opinion is the crucial date." 381 U.S. 639.

When new statutes are enacted or when new judicial decisions changing old rules are announced, necessarily somebody is affected for good and for bad by the date on which the change is made. Unless a better reason can be given than simply to say that the date chosen hurts me and affects my rights, then the date upon which the change is made must be binding upon all. This in substance is what the petitioner's argument resolves itself to.

Many courts have granted retroactive effect to an overruling decision as was done by the Supreme Court of Virginia in *Surratt* and *Smith*. Courts having no jurisdiction to render advisory opinions and only authorized to decide cases or controversies as is the Supreme Court of Virginia have granted retroactive effect to the parties to the overruling case saying that otherwise their decision would be merely dictum and an advisory decision.

Others have granted retroactive effect to the parties prevailing upon the theory that those litigants bringing about the change should be rewarded for their creative effort and expense in challenging the old rule thus lending vitality to the power of the Court to keep pace with changing conditions which require reconsideration of old principles.

Each is based upon reason and upon logic and each is applicable to the overruling decision in *Smith* v. *Kauffman* and *Surratt* v. *Thompson*. How the various courts have dealt with this problem is the subject of discussion in *Overruling Decision—Application*, 10 A.L.R. 3rd 1371, §§ 8(b), 8(c) and 8(d). A similar annotation of the Supreme Court decisions as they have dealt with the problem

is found at *Supreme Court Decision—Retroactivity,* 22 L.Ed. 2d 821, § 5.

CONCLUSION

No Fourteenth Amendment rights of the Petitioners have been violated by the application of these overruling decisions to the parties thereto and in making the decisions prospective only as to all other parties. This Court should not entertain the idea that it can fix a better date for the prospective application of overruling decisions of the Supreme Court of Virginia than the date upon which the decisions were announced. There is no precedent for such action and there is no provision of the Constitution of the United States requiring it. The petition herein should be denied.

Respectfully submitted,

J. SEGAR GRAVATT
Of Counsel for Appellees

J. SEGAR GRAVATT
105 East Elm Street
Blackstone, Virginia

W. E. NEBLETT
Lunenburg, Virginia

J. B. BROWDER
RUFUS G. COLDWELL, JR.
Browder, Russell, Little, Morris & Butcher
1510 Ross Building
801 East Main Street
Richmond, Virginia 23219

Counsel for Appellees

MOTION FILED
APR 12 1974
SUPREME COURT, U. S.

In The

Supreme Court of the United States

October Term, 1973

No. 73-1282

EUNICE S. FOUNTAIN,

Petitioner,

v.

SPENCER FOUNTAIN,

Respondent;

EVA L. JACKSON,

Petitioner,

v.

JUNIUS I. JACKSON,

Respondent.

ON THE PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Motion for Leave to File Brief and Brief of Cheryl Y. Conway, Stanley Lyles, Doris Lyles, Joseph Lyles, Jr., David Lyles, Calvin Evans, Patricia Evans, Rodney Evans, Veronica Evans and Robert Lee Weaver, Jr.

REGINALD H. PETTUS
Keysville, Virginia

LEONARD W. LAMBERT
3026 P Street
Richmond, Virginia 23223

RICHARD W. HOGAN
Massey Building
4th and Main Streets
Richmond, Virginia 23219

JOSEPH T. WEAVER
Victoria, Virginia 23974
Of Counsel

DONALD K. BUTLER
201 North Boulevard
Richmond, Virginia 23220
Counsel for Amici Curiae

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In The

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No. .....

EUNICE S. FOUNTAIN,

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Respondent.

ON THE PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Motion for Leave to File Briefs as Amici Curiae

Pursuant to Rule 42 of the United States Supreme Court, Cheryl Y. Conway, Stanley Lyles, Doris Lyles, Joseph Lyles, Jr., David Lyles, Calvin Evans, Patricia Evans, Rodney Evans, Veronica Evans and Robert Lee Weaver, Jr., infants, respectfully move this Court for leave to file the brief *amicus curiae* which is submitted herewith. The consent of the attorney for the petitioner herein has been

given by letter, the orginial of which was sent to the Court, but the attorneys for the respondents herein have refused to consent to the filing of a brief by the Conway and Lyles children, and it is assumed that consent would likewise be refused to Weaver and the Evans children. (See letter from counsel for respondent Fountain, Appendix B.)

All of the applicants herein are infants who have made claims against parents for injuries sustained in automobile accidents occurring before September 1, 1971 when the Supreme Court of Virginia rendered a decision overruling prior Virginia decisions holding that a minor child could not sue a parent, *Smith* v. *Kauffman*, 212 Va. 181, 183 S.E. 2d 190 (1971), and after August 18, 1968, the date that the accident in *Smith* v. *Kauffman* occurred. There are others in Virginia similarly situated, as indicated in the letter from counsel for respondent Spencer Fountain to counsel for some *amici* (Appendix B) stating that "there are probably at least a hundred other attorneys with cases of a similar nature . . ."

This Court is called upon to decide whether the decision of the Supreme Court of Virginia making an earlier decision abrogating interspousal immunity prospective only from the date of the decision is a denial of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States to parties whose claims against their spouses arose out of an accident occurring before the date of the decision abrogating the immunity but after the accident in that decision occurred. On the same day of the decision abrogating inter-spousal immunity the Supreme Court of Virginia in *Smith* v. *Kauffman* abrogated the intra-family immunity doctrine thereby permitting minor dependent children to sue their parents for injuries received in motor vehicle accidents due

to the parent's negligence. Since the decision in both *Fountain* v. *Fountain* and *Jackson* v. *Jackson* involved the doctrine of inter-spousal immunity and adult litigants, and since the courts have traditionally accorded special treatment to minors in some situations, applicants feel that the facts in their respective cases should be before the Court in deciding this case.

Wherefore, it is respectfully requested that this application be granted.

Respectfully submitted,

Donald K. Butler,
Counsel for Amici Curiae

In The

Supreme Court of the United States

October Term, 1973

No. .....

EUNICE S. FOUNTAIN,

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v.

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EVA L. JACKSON,

Petitioner,

v.

JUNIUS I. JACKSON,

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ON THE PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Brief of Cheryl Y. Conway, Stanley Lyles, Doris Lyles, Joseph Lyles, Jr., David Lyles, Calvin Evans, Patricia Evans, Rodney Evans, Veronica Evans and Robert Lee Weaver, Jr.

The interest of the *amici curiae* is set forth in the Motion for Leave to File Brief, *supra*.

OPINIONS BELOW

The opinions below are reported at 214 Va. 347, 200 S.E. 2d 513 and 214 Va. 351, 200 S.E. 2d 515 and are set forth in Appendix A and B of the Petition of Fountain and Jackson.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF CASE

On September 1, 1971 the Supreme Court of Virginia decided in the case of *Surratt* v. *Thompson,* 212 Va. 191, 183 S.E. 2d 200, that the doctrine of inter-spousal immunity in motor vehicle accident cases would be abolished, thereby permitting one spouse in the case to sue the other for injuries sustained in an accident occurring on June 23, 1968. In the case of *Smith* v. *Kauffman,* 212 Va. 181, 183 S.E. 2d 190, decided the same day, that Court abolished the intra-family doctrine in motor vehicle accidents and thereby permitted an infant child to sue her parent for injuries sustained in an accident occurring on August 18, 1968. In the cases of each of these infant *amici curiae,* injuries were sustained in accidents occurring after August 18, 1968, the date of the accident in the *Smith* case, and before September 1, 1971, the date of the decision in that case.

Cheryl Y. Conway, age 3 on May 18, 1971 when she was involved in an accident in an automobile being operated by her mother, Shirley Conway, filed suit against her mother in the Law and Equity Court of the City of Richmond, Virginia (now the Circuit Court of the City of Richmond, Division I) seeking $50,000.00 damages for personal injuries arising out of the accident. Among the injuries sustained by the Conway child is the permanent loss of use of one arm. This suit ended in a voluntary nonsuit on May 9, 1972 when it was learned that the judges of the Law and Equity Court had held that the petitioner herein, Eunice S. Fountain, and others could not sue a parent or spouse on

the ground that the decisions in *Smith* v. *Kauffman* and *Surratt* v. *Thompson,* were not retrospective and hence not applicable to cases involving accidents occurring prior to the date of the decisions. Counsel for Conway intends to reinstitute suit for her serious injuries if petitioners are successful in reversing the decisions below.

The four Lyles children filed suits against their stepfather for damages totaling $85,000.00 for injuries received in an accident when the vehicle they were occupying, being driven by their mother, collided with another car being driven by their stepfather on August 9, 1970. Pleas of parental immunity have been filed in behalf of the defendant, arguing that the decision in *Smith* v. *Kauffman* is not retroactive so as to be applicable to this case. Decisions on that question as well as on the motion to join the mother as an additional defendant are pending in the Circuit Court of Lunenburg County, Virginia.

Calvin Evans, Patricia Evans, Rodney Evans and Veronica Evans filed suits against their mother, Mary A. Evans, in the Circuit Court of Chesterfield County, Virginia in the amounts of $50, 000.00, $35,000.00, $25,000.00 and $10,000.00 respectively as damages for injuries sustained in an automobile accident occurring on August 14, 1971. The defendants' pleas of intrafamily immunity were kept under advisement pending the decisions below, after which the defendants' motions for summary judgment were granted on January 5, 1974. On February 4, 1974 both plaintiffs filed a notice of appeal to the Supreme Court of Virginia assigning as error a denial of equal protection and due process of law in not applying the decisions of *Smith* and *Surratt* retroactively.

Robert Lee Weaver, Jr. was injured in an accident on December 20, 1970 while an occupant of a car being driven by his father, Robert Lee Weaver, Sr. At the time of the accident the defendant was separated from the plaintiff's mother who had custody of him, and defendant had picked up the plaintiff in an automobile without the mother's consent. Accident investigation reveals that the defendant's car left the highway traveling at 80 m.p.h. in a 55 m.p.h. zone striking a tree, and that the defendant was intoxicated at the time. Among the injuries sustained by the plaintiff were lacerations of the face causing scars requiring extensive plastic surgery, facial nerve impairment causing some facial immobility, permanent impairment to hearing in both ears, and psychological damage. The Weaver child filed suit against his father in the Circuit Court of Lunenburg County, Virginia seeking $250,000.00 compensatory damages and an equal amount in punitive damages. Initially a defense motion to dismiss upon the ground of parental immunity was overruled based on the retroactive application of the *Smith* case, and the case was set for an October, 1973 trial date but had to be continued due to the unavailibility of a witness. Subsequent to that the decision below was rendered and the defendant has moved for a rehearing on its motion to dismiss.

QUESTION PRESENTED FOR REVIEW

The Question Presented for Review is well stated in the Petition for Writ of Certiorari at page 2.

ARGUMENT

Counsel for *amici* have read and for brevity adopt by reference the argument found at pages 5 through 15 of the Petition for Writ of Certiorari. In addition it is pointed

out that while the Fountain and Jackson cases involve suits by wife against husband, and not by child against parent as in the cases of the applicants, it is obvious from reading the decisions below that children injured before the date of the decisions in *Surratt* v. *Thompson* and *Smith* v. *Kauffman, supra,* as well as spouses, are precluded by the decisions below from maintaining suits against their parents. The considerations enunciated in *Fountain* relative to the reliance of insureds and insurers on existing law (see Appendix A of Petition at page 20), are perhaps more applicable to children's claims against parents than to spouses against spouses since Section 8-30 of the 1950 *Code of Virginia,* as amended, permits the tolling of statutes of limitations during infancy. Obviously unless *certiorari* is granted herein, many infants will be denied trial precisely as spouses were denied the right to recover in the two cases below.

The Court below placed much emphasis on the reliance of insureds and insurers in Virginia on the existing law, and herein lies the invidiousness and lack of a rational basis for distinguishing between the injured in *Smith* and *Surratt,* and these petitioners and *amici.* As pointed out in the Petition at page 7, the Supreme Court of Virginia seemed to ignore the uncontradicted evidence before it that a retroactive application of the principles in *Smith* and *Surratt* would not prejudice insurers or insureds. Further, indications of the judicial erosion of immunities because of the advent of liability insurance appeared as early as 1939 when the Supreme Court of Virginia said:

> "In later years, economic, social and legislative changes have caused a judicial reaction to the earlier views. Modern methods of business, new or enlarged occupational capacities and the advent of the automobile and liability indemnity insurance have placed

> the parties in a different position. Therefore, the effect of the earlier decisions must be considered in relation to the occasion, facts and laws upon which they were based. A correct determination of each case must necessarily depend upon its facts and circumstances and the law applicable thereto. Rules of thumb must give way to rules of reason."

Worrell v. *Worrell*, 174 Va. 11, 4 S.E. 2d 343 (1939) at p. 20, pp. 346, 347.

When in 1958 the enactment of the Virginia uninsured motorist laws "effected a further and major change of circumstances" in Virginia's insurance laws (*Smith* v. *Kauffman* at 184), insurance companies in Virginia should have certainly by that time heeded the statement in the *Worrell* opinion at page 28, 4 S.E. 2d at 350, where the Court said:

> "[W]e think that the statutes of this State providing for compulsory insurance indemnity to passengers of a common carrier for damages resulting from the negligent operation of its vehicles, evidence a purpose and policy to afford protection to all such persons from damages arising in tort from the relationship of passenger and carrier."

Thus reliance on existing law by insurers and insureds provide no rational basis for the distinctions made below in *Fountain* and *Jackson*.

The facts set out above are sufficient to show that the cases of petitioners Fountain and Jackson or of these *amici* are not "legal sports" presenting a "unique set of circumstances" which is not "likely to recur." *United States* v. *Shannon*, 342 U.S. 288, 294-5 (1952). The denial of compensation to petitioners, to those who now seek leave to appear as *amici*, and to many others similarly situated in

Virginia and elsewhere, both as a matter of substantive rights and as a denial of a procedural right which Virginia earlier granted others similarly situated in the *Smith* and *Surratt* cases is a matter more worthy of review than the appeal granted in *Dillard* v. *Industrial Commission of Virginia*, 347 F.Supp. 71 (1972), cert. granted, ... U.S. ....., Case No. 73-5412 (October Term, 1973). That case involved a relatively minor procedural deficiency in the Virginia Workmen's Compensation Act which did not, like the decisions below, completely deprive a claimant of a right to compensation for personal injuries.

CONCLUSION

The motion for leave to file this brief should be granted, and *certiorari* should be granted and the judgments below reversed.

Respectfully submitted,

Donald K. Butler
201 North Boulevard
Richmond, Virginia 23220,

Counsel for Amici Curiae

APPENDIX A

ALLEN, ALLEN, ALLEN & ALLEN
Professional Association
1809 Staples Mill Road
Post Office Box 6855
Richmond, Virginia 23230

[LETTERHEAD OMITTED]

March 4, 1974

Hon. Michael Rodak, Jr., Clerk
Supreme Court of the United States
Washington, D.C. 20541

Re: Fountain v. Fountain;
Jackson v. Jackson
No. 73-1282

Dear Mr. Rodak:

As counsel for the petitioners in these cases, in which a petition for certiorari was filed February 20, 1974, I give consent to filing of a brief amicus curiae by Donald K. Butler, Esquire, of Richmond, on behalf of Cheryl Conway and others similarly situated.

Respectfully,

James A. Eichner

JAE/rw
cc: Donald K. Butler, Esq.
201 North Boulevard
Richmond, VA 23220

APPENDIX B

BROWDER, RUSSELL, LITTLE AND MORRIS
1510 Ross Building
Richmond, Virginia 23219

[LETTERHEAD OMITTED]

January 25, 1974

Reginald H. Pettus, Esq.
Keysville, Virginia 23947

RE: Fountain v. Fountain
Jackson v. Jackson

Dear Reg:

I have my copy of your letter to Segar Gravatt and me containing a request similar to one made by Donald K. Butler, to whom you will note I am sending a copy of this letter, in view of a case he has involving an infant who would like to sue his mother.

I told Don in a letter, dated January 8, 1974, that I could then see no benefit to my client in complicating Jim Eichner's apparent intention to apply for a writ of *certiorari* by consenting to a brief by him *amicus curiae* but that I would think the matter over and let him hear from me again in due course.

Having so thought it over, I still am of the opinion that there is no reason to complicate anything Jim Eichner proposes to do in the *Fountain* case by bringing in a lot of other people (and I might say that if you and Don come in there are probably at least a hundred other attorneys with cases of a similar nature that should be allowed to come in, and there are at least a hundred insurance companies in Virginia that are also interested in the point who would have a right to come in). All of this seems to me to be to the benefit of no one, including the Court, since as I told Don,

I am sure Jim Eichner will be delighted to have your assistance as well as Don's in preparing whatever brief he proposes to prepare.

I, frankly, don't know what has transpired in Jim's mind since he wrote the article appearing in Vol. 4 of the "University of Virginia Law Review" in 1970 wherein, in speaking of judicial as well as legislative changes in the immunity doctrine, he said at page 279 that:

> "The fear of retroactivity is a groundless one, for a decision to abrogate immunity may be made to take effect prospectively. Other states' solutions have been to make the decision apply only to the case at bar and to causes of action arising after the filing date of the decision, . . ." (citing cases)

I certainly was not impressed with what he had to say about the federal constitutional issue in his briefs in the *Fountain* and *Jackson* cases, which consisted of one sentence in the *Fountain* case and the citation to an *A.L.R.* annotation, which he stated was authority against him except that the cases did not "involve facts like those in this case." He cited no case that did, either in that brief or in the *Jackson* brief, where he did undertake to develop the point to the extent of about one page. I don't recall that he even mentioned the point in oral argument and I don't think the court mentioned it in either opinion. Jim is a smart boy, however, and

Segar and I will of course look forward with a great deal of interest to what he has to say, including such suggestions as you, Don and others may have for him.

With kind regards, I am,

Sincerely,

/s/ Jim
J. B. Browder

JBB/alli

cc: J. Segar Gravatt, Esq.
105 East Elm Street
Blackstone, Virginia 23824

Donald K. Butler, Esq.
201 North Boulevard
Richmond, Virginia 23220

2cc: James A. Eichner, Esq.
1809 Staples Mill Road
Richmond, Virginia 23230

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In The

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October Term, 1973

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JUNIUS I. JACKSON,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

JAMES A. EICHNER
Allen, Allen, Allen & Allen
1809 Staples Mill Road
Richmond, Virginia 23230
Counsel for Petitioners

DONALD K. BUTLER
201 North Boulevard
Richmond, Virginia 23220
Counsel for Amici Curiae

In The

Supreme Court of the United States

October Term, 1973

No. 73-1282

EUNICE S. FOUNTAIN,
Petitioner,
v.
SPENCER FOUNTAIN,
Respondent;

EVA L. JACKSON,
Petitioner,
v.
JUNIUS I. JACKSON,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners and proposed *amici curiae* respectfully pray, pursuant to Rule 58(2), that this Court grant rehearing of its order of April 15, 1974, denying certiorari.

Intervening circumstances of substantial effect on the question of whether the Court should review the denial of

right to litigate complained of in the petition for certiorari include the filing on April 12, 1974, of a motion for leave to file brief *amici curiae*, and annexed *amici* brief, which filing occurred hours after the Court's April 12 certiorari conference in this case. Page 2 of said motion, and Appendix B, p. 13, thereof, show a large number of claimants adversely affected by the action of the Court below in ruling against petitioners.

Another substantial ground available to petitioners and *amici* although not previously expressly presented or stressed is the point litigated in *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1930).[1] There the Court denied certiorari, 280 U.S. 604, later reversed this order and granted certiorari, 280 U.S. 550, and then reversed and remanded, holding that the state supreme court had "denied to the plaintiff 'due process of law'—using that term in its *primary sense* of an opportunity to be heard . . ." 281 U.S. at 678. (Italics added.) The action of the court below, as pointed out at pp. 13-15 of the petition for certiorari, abruptly changed, and applied retrospectively to petitioners, a "consistent line of procedural decisions with the retroactive effect of denying" them hearings, i.e., by destroying the prior long-standing Virginia rule that the effect of overruling a common law precedent is retroactive,[2] and that a court may not ignore uncontradicted evidence.[3]

The "opportunity to be heard" which due process requires "must be granted at a meaningful time and *in a meaningful manner*." *Armstrong* v. *Manzo*, 380 U.S. 545,

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[1] Cited at pp. 2, 6 and 13 of the petition for certiorari (and incorporated by reference in the brief of proposed *amici*, p. 8).

[2] *Saffel* v. *Orr*, 109 Va. 769, 774, 64 S.E. 1057, 1059 (1909), cited at p. 13 of the petition for certiorari.

[3] *Hodge* v. *American Family Life Assurance Co.*, 213 Va. 30, 31, 189 S.E.2d 351, 353 (1972), p. 15 of petition, note 22.

552 (1965) (Italics added).[4] The fact that petitioners had a hearing in the state supreme court[5] availed them little, since as previously stated[6] the state supreme court ignored all the relevant evidence.

Other substantial grounds available to petitioners and *amici*, although not previously expressly presented, are:

1. That the decisions below decided substantial and unsettled federal constitutional questions in an erroneous or at least doubtful manner, i.e., contrary to the condemnation of arbitrary denial of procedural equal protection and due process, found in *Brinkerhoff-Faris, supra; Bouie* v. *Columbia*, 378 U.S. 347, 354 (1964); *Gomez* v. *Perez*, 409 U.S. 535 (1973); *Glona* v. *American Guarantee and Liability Ins. Co.*, 391 U.S. 73, 75 (1968); *Levy* v. *Louisiana*, 391 U.S., 73, 81 (1968), and *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972),[7] where the Court struck down state classifications which barred claims for personal injuries which, like those here, did not "bear some rational relationship to a legitimate state purpose."

2. Had the decision below, and the foreign cases cited below, been decisions of United States Courts of Appeals, review would follow almost automatically to resolve conflicts between circuits. Similarity of procedural equal pro-

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[4] Recently cited in a separate opinion in *Arnett* v. *Kennedy*, ... U.S. ....., 42 L.W. 4513, 4534 (1974).

[5] Petitioner Fountain got *none* in the *trial* court; the voluminous evidence tendered on the immunity plea there, much of which is set out at pp. 3-28 of the Appendix below, heretofore filed with this Court, was ignored by the trial judge who mechanistically entered judgment solely because another judge of the same court had ruled similarly without evidence in another case. Fountain opening brief, pp. 1-2, 19-20.

[6] Petition for Certiorari, pp. 4, 5, 7, 15.

[7] Cited at pp. 6-7 of the petition for certiorari.

tection and due process rights, as a matter of *federal* constitutional law, should not vary from state to state, as now is the case because of the conflict between the Virginia decision below as compared to contrary results in New York, Kentucky, Texas, California, and to some extent, New Jersey and Minnesota.[8]

CONCLUSION

Petitioners and amici have been invidiously discriminated against in being denied the right to litigate given others similarly situated in Virginia and many of its sister states. For the reasons set forth above and in the petition for certiorari and brief of proposed *amici*, it is respectfully urged that rehearing be granted, the order of April 15, 1974, revoked, leave to file granted *amici*, and certiorari granted.

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[8] Although the true state of the law in these jurisdictions was brought to the attention of the court below, as shown in petitioner Fountain's opening brief, pp. 5-6 and reply brief, pp. 6-7, copies of which were filed with this Court and which are referred to at pp. 10-12 of the petition for certiorari, the court below in its opinion (petition, Appendix A, pp. 19-20) inexplicably ignored *Eicher* v. *Jones*, 285 Minn. 409, 173 N.W. 427 (1970); *Barile* v. *Anderson*, 203 N.W.2d 366 (Minn. 1972), and *Felderhoff* v. *Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971). See also p. 11, note 13, of the petition for certiorari as to the apparently similar situation in New Hampshire and Wisconsin.

CERTIFICATE OF COUNSEL

It is certified that this motion is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58(2).

Respectfully submitted,

JAMES A. EICHNER
Allen, Allen, Allen & Allen
1809 Staples Mill Road
Richmond, Virginia 23230
Counsel for Petitioners

DONALD K. BUTLER
201 North Boulevard
Richmond, Virginia 23220
Counsel for Amici Curiae

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In The

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No. 73-1282

EUNICE S. FOUNTAIN,
Petitioner,
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JUNIUS I. JACKSON,
Respondent.

ON THE PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Motion for Leave to File Brief and Brief of Cheryl Y. Conway, Stanley Lyles, Doris Lyles, Joseph Lyles, Jr., David Lyles, Calvin Evans, Patricia Evans, Rodney Evans, Veronica Evans and Robert Lee Weaver, Jr.
in Support of the Petition for Rehearing

REGINALD A. PETTUS
Keysville, Virginia

LEONARD W. LAMBERT
3026 P Street
Richmond, Virginia 23223

RICHARD W. HOGAN
Massey Building
4th and Main Streets
Richmond, Virginia 23219

JOSEPH T. WEAVER
Victoria, Virginia 23974
Of Counsel

DONALD K. BUTLER
201 North Boulevard
Richmond, Virginia 23220
Counsel for Amici Curiae

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In The

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No. .....

EUNICE S. FOUNTAIN,

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Respondent.

ON THE PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Motion for Leave to File Briefs as Amici Curiae

Pursuant to Rule 42 of the United States Supreme Court, Cheryl Y. Conway, Stanley Lyles, Doris Lyles, Joseph Lyles, Jr., David Lyles, Calvin Evans, Patricia Evans, Rodney Evans, Veronica Evans and Robert Lee Weaver, Jr., infants, respectfully move this Court for leave to file the brief *amicus curiae* which is submitted herewith. The consent of the attorney for the petitioner herein has been

given by letter, the orginial of which was sent to the Court, but the attorneys for the respondents herein have refused to consent to the filing of a brief by the Conway and Lyles children, and it is assumed that consent would likewise be refused to Weaver and the Evans children. (See letter from counsel for respondent Fountain, Appendix B.)

All of the applicants herein are infants who have made claims against parents for injuries sustained in automobile accidents occurring before September 1, 1971 when the Supreme Court of Virginia rendered a decision overruling prior Virginia decisions holding that a minor child could not sue a parent, *Smith* v. *Kauffman*, 212 Va. 181, 183 S.E. 2d 190 (1971), and after August 18, 1968, the date that the accident in *Smith* v. *Kauffman* occurred. There are others in Virginia similarly situated, as indicated in the letter from counsel for respondent Spencer Fountain to counsel for some *amici* (Appendix B) stating that "there are probably at least a hundred other attorneys with cases of a similar nature . . ."

This Court is called upon to decide whether the decision of the Supreme Court of Virginia making an earlier decision abrogating interspousal immunity prospective only from the date of the decision is a denial of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States to parties whose claims against their spouses arose out of an accident occurring before the date of the decision abrogating the immunity but after the accident in that decision occurred. On the same day of the decision abrogating inter-spousal immunity the Supreme Court of Virginia in *Smith* v. *Kauffman* abrogated the intra-family immunity doctrine thereby permitting minor dependent children to sue their parents for injuries received in motor vehicle accidents due

to the parent's negligence. Since the decision in both *Fountain* v. *Fountain* and *Jackson* v. *Jackson* involved the doctrine of inter-spousal immunity and adult litigants, and since the courts have traditionally accorded special treatment to minors in some situations, applicants feel that the facts in their respective cases should be before the Court in deciding this case.

Wherefore, it is respectfully requested that this application be granted.

Respectfully submitted,

Donald K. Butler,
Counsel for Amici Curiae

In The

Supreme Court of the United States

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No. .....

EUNICE S. FOUNTAIN,

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v.

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v.

JUNIUS I. JACKSON,

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ON THE PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Brief of Cheryl Y. Conway, Stanley Lyles, Doris Lyles, Joseph Lyles, Jr., David Lyles, Calvin Evans, Patricia Evans, Rodney Evans, Veronica Evans and Robert Lee Weaver, Jr.

The interest of the *amici curiae* is set forth in the Motion for Leave to File Brief, *supra.*

OPINIONS BELOW

The opinions below are reported at 214 Va. 347, 200 S.E. 2d 513 and 214 Va. 351, 200 S.E. 2d 515 and are set forth in Appendix A and B of the Petition of Fountain and Jackson.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF CASE

On September 1, 1971 the Supreme Court of Virginia decided in the case of *Surratt* v. *Thompson,* 212 Va. 191, 183 S.E. 2d 200, that the doctrine of inter-spousal immunity in motor vehicle accident cases would be abolished, thereby permitting one spouse in the case to sue the other for injuries sustained in an accident occurring on June 23, 1968. In the case of *Smith* v. *Kauffman,* 212 Va. 181, 183 S.E. 2d 190, decided the same day, that Court abolished the intra-family doctrine in motor vehicle accidents and thereby permitted an infant child to sue her parent for injuries sustained in an accident occurring on August 18, 1968. In the cases of each of these infant *amici curiae,* injuries were sustained in accidents occurring after August 18, 1968, the date of the accident in the *Smith* case, and before September 1, 1971, the date of the decision in that case.

Cheryl Y. Conway, age 3 on May 18, 1971 when she was involved in an accident in an automobile being operated by her mother, Shirley Conway, filed suit against her mother in the Law and Equity Court of the City of Richmond, Virginia (now the Circuit Court of the City of Richmond, Division I) seeking $50,000.00 damages for personal injuries arising out of the accident. Among the injuries sustained by the Conway child is the permanent loss of use of one arm. This suit ended in a voluntary nonsuit on May 9, 1972 when it was learned that the judges of the Law and Equity Court had held that the petitioner herein, Eunice S. Fountain, and others could not sue a parent or spouse on

the ground that the decisions in *Smith* v. *Kauffman* and *Surratt* v. *Thompson*, were not retrospective and hence not applicable to cases involving accidents occurring prior to the date of the decisions. Counsel for Conway intends to reinstitute suit for her serious injuries if petitioners are successful in reversing the decisions below.

The four Lyles children filed suits against their stepfather for damages totaling $85,000.00 for injuries received in an accident when the vehicle they were occupying, being driven by their mother, collided with another car being driven by their stepfather on August 9, 1970. Pleas of parental immunity have been filed in behalf of the defendant, arguing that the decision in *Smith* v. *Kauffman* is not retroactive so as to be applicable to this case. Decisions on that question as well as on the motion to join the mother as an additional defendant are pending in the Circuit Court of Lunenburg County, Virginia.

Calvin Evans, Patricia Evans, Rodney Evans and Veronica Evans filed suits against their mother, Mary A. Evans, in the Circuit Court of Chesterfield County, Virginia in the amounts of $50, 000.00, $35,000.00, $25,000.00 and $10,000.00 respectively as damages for injuries sustained in an automobile accident occurring on August 14, 1971. The defendants' pleas of intrafamily immunity were kept under advisement pending the decisions below, after which the defendants' motions for summary judgment were granted on January 5, 1974. On February 4, 1974 both plaintiffs filed a notice of appeal to the Supreme Court of Virginia assigning as error a denial of equal protection and due process of law in not applying the decisions of *Smith* and *Surratt* retroactively.

Robert Lee Weaver, Jr. was injured in an accident on December 20, 1970 while an occupant of a car being driven by his father, Robert Lee Weaver, Sr. At the time of the accident the defendant was separated from the plaintiff's mother who had custody of him, and defendant had picked up the plaintiff in an automobile without the mother's consent. Accident investigation reveals that the defendant's car left the highway traveling at 80 m.p.h. in a 55 m.p.h. zone striking a tree, and that the defendant was intoxicated at the time. Among the injuries sustained by the plaintiff were lacerations of the face causing scars requiring extensive plastic surgery, facial nerve impairment causing some facial immobility, permanent impairment to hearing in both ears, and psychological damage. The Weaver child filed suit against his father in the Circuit Court of Lunenburg County, Virginia seeking $250,000.00 compensatory damages and an equal amount in punitive damages. Initially a defense motion to dismiss upon the ground of parental immunity was overruled based on the retroactive application of the *Smith* case, and the case was set for an October, 1973 trial date but had to be continued due to the unavailibility of a witness. Subsequent to that the decision below was rendered and the defendant has moved for a rehearing on its motion to dismiss.

QUESTION PRESENTED FOR REVIEW

The Question Presented for Review is well stated in the Petition for Writ of Certiorari at page 2.

ARGUMENT

Counsel for *amici* have read and for brevity adopt by reference the argument found at pages 5 through 15 of the Petition for Writ of Certiorari. In addition it is pointed

out that while the Fountain and Jackson cases involve suits by wife against husband, and not by child against parent as in the cases of the applicants, it is obvious from reading the decisions below that children injured before the date of the decisions in *Surratt* v. *Thompson* and *Smith* v. *Kauffman, supra,* as well as spouses, are precluded by the decisions below from maintaining suits against their parents. The considerations enunciated in *Fountain* relative to the reliance of insureds and insurers on existing law (see Appendix A of Petition at page 20), are perhaps more applicable to children's claims against parents than to spouses against spouses since Section 8-30 of the 1950 *Code of Virginia,* as amended, permits the tolling of statutes of limitations during infancy. Obviously unless *certiorari* is granted herein, many infants will be denied trial precisely as spouses were denied the right to recover in the two cases below.

The Court below placed much emphasis on the reliance of insureds and insurers in Virginia on the existing law, and herein lies the invidiousness and lack of a rational basis for distinguishing between the injured in *Smith* and *Surratt,* and these petitioners and *amici.* As pointed out in the Petition at page 7, the Supreme Court of Virginia seemed to ignore the uncontradicted evidence before it that a retroactive application of the principles in *Smith* and *Surratt* would not prejudice insurers or insureds. Further, indications of the judicial erosion of immunities because of the advent of liability insurance appeared as early as 1939 when the Supreme Court of Virginia said:

> "In later years, economic, social and legislative changes have caused a judicial reaction to the earlier views. Modern methods of business, new or enlarged occupational capacities and the advent of the automobile and liability indemnity insurance have placed

> the parties in a different position. Therefore, the effect of the earlier decisions must be considered in relation to the occasion, facts and laws upon which they were based. A correct determination of each case must necessarily depend upon its facts and circumstances and the law applicable thereto. Rules of thumb must give way to rules of reason."

Worrell v. *Worrell,* 174 Va. 11, 4 S.E. 2d 343 (1939) at p. 20, pp. 346, 347.

When in 1958 the enactment of the Virginia uninsured motorist laws "effected a further and major change of circumstances" in Virginia's insurance laws (*Smith* v. *Kauffman* at 184), insurance companies in Virginia should have certainly by that time heeded the statement in the *Worrell* opinion at page 28, 4 S.E. 2d at 350, where the Court said:

> "[W]e think that the statutes of this State providing for compulsory insurance indemnity to passengers of a common carrier for damages resulting from the negligent operation of its vehicles, evidence a purpose and policy to afford protection to all such persons from damages arising in tort from the relationship of passenger and carrier."

Thus reliance on existing law by insurers and insureds provide no rational basis for the distinctions made below in *Fountain* and *Jackson.*

The facts set out above are sufficient to show that the cases of petitioners Fountain and Jackson or of these *amici* are not "legal sports" presenting a "unique set of circumstances" which is not "likely to recur." *United States* v. *Shannon,* 342 U.S. 288, 294-5 (1952). The denial of compensation to petitioners, to those who now seek leave to appear as *amici,* and to many others similarly situated in

Virginia and elsewhere, both as a matter of substantive rights and as a denial of a procedural right which Virginia earlier granted others similarly situated in the *Smith* and *Surratt* cases is a matter more worthy of review than the appeal granted in *Dillard* v. *Industrial Commission of Virginia*, 347 F.Supp. 71 (1972), cert. granted, ... U.S. ....., Case No. 73-5412 (October Term, 1973). That case involved a relatively minor procedural deficiency in the Virginia Workmen's Compensation Act which did not, like the decisions below, completely deprive a claimant of a right to compensation for personal injuries.

CONCLUSION

The motion for leave to file this brief should be granted, and *certiorari* should be granted and the judgments below reversed.

Respectfully submitted,

Donald K. Butler
201 North Boulevard
Richmond, Virginia 23220.

Counsel for Amici Curiae

APPENDIX A

ALLEN, ALLEN, ALLEN & ALLEN
Professional Association
1809 Staples Mill Road
Post Office Box 6855
Richmond, Virginia 23230

[LETTERHEAD OMITTED]

March 4, 1974

Hon. Michael Rodak, Jr., Clerk
Supreme Court of the United States
Washington, D.C. 20541

Re: Fountain v. Fountain;
Jackson v. Jackson
No. 73-1282

Dear Mr. Rodak:

As counsel for the petitioners in these cases, in which a petition for certiorari was filed February 20, 1974, I give consent to filing of a brief amicus curiae by Donald K. Butler, Esquire, of Richmond, on behalf of Cheryl Conway and others similarly situated.

Respectfully,

James A. Eichner

JAE/rw
cc: Donald K. Butler, Esq.
201 North Boulevard
Richmond, VA 23220

APPENDIX B

BROWDER, RUSSELL, LITTLE AND MORRIS
1510 Ross Building
Richmond, Virginia 23219

[LETTERHEAD OMITTED]

January 25, 1974

Reginald H. Pettus, Esq.
Keysville, Virginia 23947

RE: Fountain v. Fountain
Jackson v. Jackson

Dear Reg:

I have my copy of your letter to Segar Gravatt and me containing a request similar to one made by Donald K. Butler, to whom you will note I am sending a copy of this letter, in view of a case he has involving an infant who would like to sue his mother.

I told Don in a letter, dated January 8, 1974, that I could then see no benefit to my client in complicating Jim Eichner's apparent intention to apply for a writ of *certiorari* by consenting to a brief by him *amicus curiae* but that I would think the matter over and let him hear from me again in due course.

Having so thought it over, I still am of the opinion that there is no reason to complicate anything Jim Eichner proposes to do in the *Fountain* case by bringing in a lot of other people (and I might say that if you and Don come in there are probably at least a hundred other attorneys with cases of a similar nature that should be allowed to come in, and there are at least a hundred insurance companies in Virginia that are also interested in the point who would have a right to come in). All of this seems to me to be to the benefit of no one, including the Court, since as I told Don,

I am sure Jim Eichner will be delighted to have your assistance as well as Don's in preparing whatever brief he proposes to prepare.

I, frankly, don't know what has transpired in Jim's mind since he wrote the article appearing in Vol. 4 of the "University of Virginia Law Review" in 1970 wherein, in speaking of judicial as well as legislative changes in the immunity doctrine, he said at page 279 that:

> "The fear of retroactivity is a groundless one, for a decision to abrogate immunity may be made to take effect prospectively. Other states' solutions have been to make the decision apply only to the case at bar and to causes of action arising after the filing date of the decision, . . ." (citing cases)

I certainly was not impressed with what he had to say about the federal constitutional issue in his briefs in the *Fountain* and *Jackson* cases, which consisted of one sentence in the *Fountain* case and the citation to an *A.L.R.* annotation, which he stated was authority against him except that the cases did not "involve facts like those in this case." He cited no case that did, either in that brief or in the *Jackson* brief, where he did undertake to develop the point to the extent of about one page. I don't recall that he even mentioned the point in oral argument and I don't think the court mentioned it in either opinion. Jim is a smart boy, however, and

Segar and I will of course look forward with a great deal of interest to what he has to say, including such suggestions as you, Don and others may have for him.

With kind regards, I am,

Sincerely,

/s/ Jim
J. B. Browder

JBB/alli

cc: J. Segar Gravatt, Esq.
105 East Elm Street
Blackstone, Virginia 23824

Donald K. Butler, Esq.
201 North Boulevard
Richmond, Virginia 23220

2cc: James A. Eichner, Esq.
1809 Staples Mill Road
Richmond, Virginia 23230